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Jennifer J. Johnson, Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Avenue, N.W.
Washington, D.C. 20551

Facsimile: (202) 452-3819

Re: Regulation E; Proposed Rule
Federal Reserve System [Regulation E; Docket No. R-1377]
Wells Fargo's comments on proposed rule regarding fees and expiration dates
applicable to gift certificates, store gift cards, and general use prepaid cards.

Dear Sirs and Madams:

This letter is submitted on behalf of Wells Fargo & Company and its affiliates, including Wells Fargo Bank, N.A., Wells Fargo Financial National Bank, Wells Fargo Financial Bank, Wachovia Bank, N.A., and Wachovia Bank Delaware, N.A. (collectively, "Wells Fargo"), in response to the proposed rule to implement Title IV of the Credit Card Accountability Responsibility and Disclosure Act of 2009¹ ("Credit Card Act") under certain amendments to Regulation E², which implements the Electronic Fund Transfer Act. The proposed rule (the "Proposed Rule") was published in the Federal Register on November 20, 2009, at 74 Fed. Reg. 60985.

Wells Fargo appreciates the opportunity to comment and respectfully requests that the members of the Board of Governors of the Federal Reserve System ("Board") consider adopting the suggestions set forth herein.

Wells Fargo is a diversified financial services company with \$1.3 trillion in assets, providing banking, insurance, investments, mortgage, and consumer financial services through more than 10,000 stores, over 12,000 ATMs, and the internet (wellsfargo.com) across North America and the international marketplace.

¹ Pub. L. 111-24, 123 Stat. 1734 (2009)

² 12 C.F.R. Part 205

The Board is proposing to amend Regulation E to restrict the ability of a person to impose dormancy, inactivity, or service fees for certain prepaid card products, primarily gift cards. In addition, the Proposed Rule generally prohibits the sale or issuance of such products if they have an expiration date of less than five years. The Proposed Rule implements statutory requirements set forth in the Credit Card Act that are effective August 22, 2010. The final rule to be adopted by the Board is to become effective on the same date.

Wells Fargo would like to thank the Board for taking into consideration the concerns expressed by the financial services industry and in particular gift and prepaid card issuers when drafting the Proposed Rule. In particular, Wells Fargo commends the Board for opting not to prescribe the amount of fees that may be charged for cards and certificates covered by the Proposed Rule. Wells Fargo also appreciates the Board's careful consideration of whether other requirements of Regulation E should apply to the products covered by the Proposed Rule.

Wells Fargo also has concerns with certain provisions in the Proposed Rule, including: (1) the potential applicability of proposed Section 205.20 to cards and certificates used for non-consumer purposes; (2) the potentially limited scope of the exclusion for cards "not marketed or labeled as a gift card"; (3) the number of disclosures that must be provided on a certificate or card and the logistical challenges therewith; (4) the possible retroactive application of the rule to cover cards already in the marketplace; and (5) the apparent conflict between the state unclaimed property laws and the expiration date requirements specified in the rule.

I. Responses to Specific Solicitation for Comment

- A. The board should limit the scope of the final rule so that it does not apply to cards or certificates that are used for business purposes even if they would be covered by the rule if used for consumer purposes.

Wells Fargo encourages the Board to limit the scope of coverage under the final rule so that it only applies to store gift cards, gift certificates, or general use prepaid cards that are not excluded under Regulation E proposed Section 205.20(b)³ ("Covered Cards") and that are used for consumer purposes. Regulation E by definition only covers accounts that are used primarily for personal, family, or household purposes with the objective of affording consumers certain protections that

³ Exclusions provided in the Proposed Rule are as follows: (1) Useable solely for telephone services; (2) Reloadable and not marketed or labeled as a gift card or gift certificate; (3) A loyalty, award, or promotional gift card; (4) Not marketed to the general public; (5) Issued in paper form only; or (6) Redeemable solely for admission to events or venues at a particular location or group of affiliated locations, or to obtain goods or services, in conjunction with admission to such events or venues, at the event of venue or at specific locations affiliated with and in geographic proximity to the event or venue. See Proposed Rule Section 205.20(b).

a commercial customer may not need.⁴ To extend the rule in the case of Covered Cards to include cards or certificates used for commercial purposes is not warranted by any unique risks or characteristics of these products and may result in confusion with respect to the scope of Regulation E.

The Board has asked whether the “consumer use” distinction, if provided, will be meaningful since issuers would then have to monitor the end use of Covered Cards to determine if such non-consumer use brings a Covered Card outside the scope of the rule. Wells Fargo agrees that, should they elect to monitor these transactions, this distinction may in fact create more work for issuers. Wells Fargo also notes that it has no immediate intention to monitor such use to treat Covered Cards used for commercial purposes differently from those used for consumer purposes. Notwithstanding the foregoing, Wells Fargo believes that the underpinnings of Regulation E also should be honored in the case of these Covered Cards and that financial institutions should have the discretion to treat consumer accounts differently than commercial accounts in the same way they do today.

Further, while many issuers may elect as a matter of policy to grant consumer rights and protections to business users in order to mitigate administrative, systemic, and operational burdens associated with differentiating the two holder populations, any final rule should continue to limit such rights and protections to consumer use only. As technology advances, issuers may be able to identify and differentiate business and consumer certificates and cards with greater efficiency, such as by automated means. In the event of such advances, an issuer may wish to develop certificate or card product lines intended exclusively for business purposes without having the encumbrance of a regulation applicable to both holder populations. Accordingly, Wells Fargo urges the Board to include the “consumer use” distinction in its final rule.

B. Wells Fargo requests additional guidance on when a card otherwise subject to exclusion under the rule may become a Covered Card within the scope of the rule due to marketing as a “Gift Card”.

Wells Fargo, like many issuers, offers a variety of prepaid card products to its customers to help satisfy their differing needs. While maintaining the attributes of a prepaid card useable with multiple, unaffiliated merchants, these products may be designed with a set of features and characteristics that appeal to different audiences. For example, in the case of a parent seeking to help a teenager learn financial management, the parent may elect not to open a deposit account and receive an associated debit card. Rather, the parent may choose to get a prepaid card funded up to a limited denomination that allows the parent to monitor his or her child’s spending while allowing the child to learn money management and budgeting skills. Similarly, in the case of a traveler seeking to manage his or her travel budget without having to carry both paper and plastic “currency,” Wells Fargo may offer a prepaid card solution that would help the traveler not only manage his or her budget, but also have

⁴ See Regulation E Section 205.1(b)

easy access to money while overseas. Neither of the aforementioned products is a gift card, in the conventional sense, in that they generally do not display the term “gift” or “present” on the card or the accompanying disclosures and they are not typically purchased with the intent of “gifting” another party. To the contrary, the primary purpose of each of these products is to help the recipient with money management. However, given the breadth of the examples provided in the commentary to Section 205.20(b)(2), if Wells Fargo were to on occasion use the term “gift” or include celebratory language in a promotion related to these products, or, if a purchaser customized a card with a message that includes the term “gift” or a celebratory motif, such actions could bring these “non-gift” cards within the coverage of the rule, as currently proposed.⁵ Accordingly, Wells Fargo encourages the Board to clarify that marketing or labeling as a “gift” or use of a celebratory motif only brings a product within the scope of the rule if it is the primary message in the marketing or labeling, as opposed to an occasional promotion or ancillary reference.

Wells Fargo is also concerned about the breadth of the examples provided in the commentary to Section 205.20(b)(2) because the examples may negate the exclusion for cards or certificates used for loyalty, award, or promotional purposes. These types of products, by definition, are meant to be “gifted” to another party and are tokens of appreciation that may be celebratory in nature. So, while a card purchased by an employer given to an employee for completion of a significant project, or one purchased by a merchant and given to a customer as a rebate, should otherwise fall within the exclusion for loyalty, award, or promotional purposes, the examples could be interpreted to mean that use of the term “gift” or use of a celebratory motif would bring the card back within the scope of the rule. Wells Fargo requests that the Board expressly clarify that the use of such motifs and terms in the case of cards or certificates purchased for loyalty, award, or promotional would not constitute “marketing or labeling as a gift card or certificate” under the rule.⁶

C. The requirement that various disclosures be made on a Covered Card may be overly burdensome with limited benefit.

Wells Fargo supports the Board’s desire to protect consumers by providing disclosures that help them understand the fees applicable to their Covered Cards and

⁵ See proposed Supplement I to Part 205-Official Staff Interpretations, Paragraph 20(b)(2)-Reloadable and Not Marketed or Labeled as a Gift Card or Gift Certificate, Commentary 2, at 74 Fed. Reg. 61008:

A card or certificate, including a general-purpose reloadable card, is marketed or labeled as a gift card or certificate even if it is only occasionally marketed as a gift card or gift certificate.

⁶ Wells Fargo also would suggest that in the examples of exclusions to Paragraph 20(b)(2), Commentary 3, that the Board modify the negative example in paragraph (iii) to make clear in that where a card or certificate is represented as a substitute for traveler’s checks or cash, that such use may be by either the purchaser or a third party. The addition of “or a third party” is appropriate because a prepaid product which is marketed as a substitute for travelers’ checks or cash may in fact be used by a party other than the original purchaser. See Fed. Reg. 61109.

the duration for which the consumer will have access to the funds underlying the Covered Card. However, Wells Fargo is concerned that the number of disclosures required directly on Covered Cards pursuant to Sections 205.20(d)(2), (e)(3), and (f)(2) of the Proposed Rule will clutter the information on the Card and compromise the Board's goal of ensuring such disclosures are "clear and conspicuous."

Proposed Section 205.20(d)(2) requires the disclosure on the Covered Card of (i) the amount of any dormancy, inactivity, or service fee; (ii) how often such fee may be assessed; and (iii) that such fee may be charged for inactivity. Proposed Section 205(e)(3) additionally requires clear and conspicuous disclosure on the Covered Card of the (i) expiration date of the underlying funds; (ii) a toll free number (and Web site, if maintained) that the consumer may contact to obtain a replacement card prior to funds expiration; and (iii) a statement that the expiration date for the Covered Card may not be the same as the expiration date for the funds underlying the Covered Card (or that the underlying funds do not expire), and that the consumer may contact the issuer for a replacement card. Finally, Section 205.20(f)(2) requires disclosure of a toll free number (and Web site, if maintained) that a consumer may use to obtain information about the fees described in (d)(2) as well as any other fees applicable to the Covered Card that are not included within the definition of a dormancy, inactivity, or service fee.

As is clear from the summary above, the amount of information that must be included on the Covered Card under the Proposed Rule is significant. Wells Fargo notes, however, that these disclosures are but a subset of the information that otherwise must be included on the card, such as the network logo, the issuer's name and/or logo, characteristics of the card (such as whether it is reloadable), FDIC insurance coverage (or lack thereof)⁷, and information on where the consumer can get information about the terms and conditions governing his or her card generally.

Practically speaking, however, the amount of space available to provide all these disclosures in a "clear and conspicuous" manner is finite and, particularly in the case of cards, relatively small. The space challenge is further exacerbated by the fact that disclosures on the back of the Covered Card cannot be placed over embossed sections of the card if such placement "obstructs the readability" of the disclosure.⁸ Given the magnetic stripe and signature strip on the back of the card, along with embossing of the card number, expiration date, personalized message, and other cardholder information on the front of the card, Wells Fargo is concerned that disclosures will now be clustered together at the bottom of the back of the card, potentially negating the consumer benefit associated with providing the disclosures on the card itself. In this regard, Wells Fargo urges the Board to reconsider whether all of the aforementioned information really must be on the Covered Card itself or if it could be provided in accompanying materials. Wells Fargo also urges the Board to

⁷ See amended FDIC General Counsel's Opinion Number 8 issued October 31, 2008 published at 73 Fed. Reg. 67155.

⁸ See proposed Supplement I to Part 205-Official Staff Interpretations, 20(c) Form of Disclosures, Paragraph 20(c)(1) – Clear and Conspicuous, Commentary 1 at 74 Fed. Reg. 61010.

reconsider whether vehicles such as stickers could be used to provide disclosures on the Covered Card. While Wells Fargo appreciates that a sticker may be removed from the Covered Card, the consumer has been put on notice of the applicable fees and would be able to call the toll free number (or check the Web site, if applicable) to get more details. Such an approach would balance the objective of notice to the consumer with the requirement that issuers provide disclosures that are clear and conspicuous.

Wells Fargo also encourages the Board to provide model cards with all the disclosures required under Sections 205.20(d)(2), (e)(3), and (f)(2) of the final rule so that the options available to the industry are more clear. Wells Fargo requests the Board to provide these models as safe harbors, not as required formats, and further encourages the Board to maintain its current position that a specific font or type is not required for a disclosure to be clear and conspicuous so that the industry may be able to continue to innovate. This is particularly important since the definition of Covered Cards very broadly includes any card, code, or other device but these products come in different sizes (which itself continues to evolve) and mediums thereby giving rise to different disclosure challenges.

Finally, with respect to the disclosures required prior to purchase under Section 205.20(c)(3), referencing Sections 205.20(d)(2), (e)(3), and (f)(1), Wells Fargo agrees that purchasers of Covered Cards may be interested in information about fees and the time period during which the funds underlying the Covered Card will be available to the consumer. Wells Fargo also agrees that different sales channels may need to provide this disclosure in different forms and therefore is supportive of the Board's decision to allow for disclosures to be provided either on the Covered Card, in materials accompanying the Covered Card, or orally at the point of sale.

However, in connection with disclosures under Section 205.20(c)(3) that may be provided orally pursuant to Section 205.20(c)(2), Wells Fargo seeks clarification of the following. The disclosure to be made prior to purchase under Section 205.20(c)(3) includes information required under paragraphs (d)(2), e(3), and f(1) of Section 205.20. Among other things, (e)(3)(iii) requires the disclosure of the following:

- (iii) A statement , disclosed with equal prominence and in close proximity to the certificate or card expiration date, that the certificate or card expires, but the underlying funds either do not expire or expire later than the certificate or card, and that the consumer may contact the issuer for a replacement card;

Wells Fargo is unclear on the manner in which an issuer orally provides this statement "in close proximity to the certificate or card expiration date." While the concept of proximity relative to a disclosure provided on the certificate or card is generally clear, this concept is less clear when this statement is provided orally. Wells Fargo would urge the Board to provide such clarification through commentary.

Wells Fargo also encourages the Board to consider adding in commentary to Section 205.20(c)(3) that an issuer will be compliant with the disclosure requirement if it has reasonable policies and procedures in place to provide the aforementioned disclosures. Thus, in the case of an isolated rogue sales clerk failing to make a disclosure or a system failure resulting in a disclosure recording not playing properly, the issuer would not be deemed non-compliant. This approach will both protect the consumer and enable issuers to control the process to the extent they are reasonably able.

D. Wells Fargo requests further clarity on which fees are included within the definition of service fee and requests consideration of the logistical challenges associated with multiple disclosures.

Wells Fargo encourages the Board to reconsider which fees specifically should be included within the definition of a service fee and subject to regulation. While Wells Fargo appreciates the Board's objective of providing the consumer with improved transparency and predictability with respect to fees, this same objective will be accomplished through the disclosure requirements of Section 205.20(f)(1) without also requiring the substantive restrictions that apply to service fees.

In addition, Wells Fargo requests that the Board provide more guidance on which fees specifically are included within the definition of a service fee. For example, in its analysis of Section 205.20(a)(6), the Board states that a balance inquiry fee, monthly maintenance fee, transaction fee, and reload fee may be included within the scope of a service fee.⁹ The Board further elaborates that transaction fees would include a fee imposed each time a transaction is conducted and foreign transaction fees.¹⁰

Since the Board has provided such a detailed list of fees which are included, Wells Fargo urges the Board to specifically clarify that fees that are not otherwise listed are excluded from coverage. Accordingly, customer service fees, or fees associated with notifying cardholders of the pending escheat of funds under a state's unclaimed property law¹¹ would be excluded from the scope of a service fee.

Finally, Wells Fargo also requests reconsideration of which fees are included within the definition of service fees because it is concerned about being able to disclose all such fees on the Covered Card. Given the breadth of the definition of a service fee in the Proposed Rule, a number of fees may need to be disclosed on the Covered Card in addition to any dormancy fee, expiration date information, toll free

⁹ See 74 Fed. Reg. 60991 and 61008.

¹⁰ See 74 Fed. Reg. 60991

¹¹ Under California Code of Civil Procedure ("CCP") Section 1520(a), as amended under Assembly Bill 1291, effective January 1, 2010, a holder providing a notice to an owner of pending escheat of property may assess a fee of up to \$2.00 therefor. Wells Fargo trusts that a fee permitted under state law would not be viewed as a service fee for purposes of the Credit Card Act.

number, and Web site information. Wells Fargo believes that this is only possible if the service fee covers a limited scope of fees and therefore requests the Board to reconsider this issue.

E. Wells Fargo prefers alternative B relative to the prohibition on sale of Covered Cards with expiration dates and offers an alternative C for the Board's consideration.

The Credit Card Act through Section 915(c) of the Electronic Funds Transfer Act prohibits the sale of a Covered Card subject to an expiration date unless the expiration date is at least five years after the Covered Card is issued or last loaded, and the terms of expiration are clearly and conspicuously stated.¹² The Board through its commentary to Section 205.20(e) of the Proposed Rule acknowledges that it is unclear whether the Credit Card Act intended that the five year expiration date requirements apply to the Covered Card or to the underlying funds and takes the position that the requirement applies to underlying funds.¹³ However, in an effort to mitigate confusion associated with a funds expiration date that may differ from the expiration date for an actual card or certificate, the Board offers two alternatives with differing disclosure requirements for compliance with this section.

Alternative A requires that Covered Cards have an expiration date for the card or certificate that is five or more years after the date the card or certificate is sold or issued to the consumer. Alternative B allows the issuer to adopt policies and procedures to ensure that a consumer will have a reasonable opportunity to purchase a card or certificate with at least five years remaining until the card or certificate expiration date. Wells Fargo appreciates that the Board is trying to find a solution that will balance its consumer protection objective with the logistical challenges associated with making changes to Covered Cards. Simply put, however, in order to effectuate the new expiration date requirements under either Alternative A or B, issuers will have to undertake significant new processes.

To start, with respect to Alternative A, systems changes and point of sale controls may have to be effectuated to prevent activation of a card with less than a five year expiration date on it at the point of sale for in-person sales. In the event a card comes up as "ineligible" for sale due to an expiration date less than five years from the date of sale, a card with the appropriate time period remaining would have to be substituted. This may result in a more "clunky" and less efficient customer experience. Issuers also will have to manage the logistical challenges and costs associated with managing inventory to the requisite five year expiration date requirement.

In this regard, Wells Fargo believes Alternative B is a more reasonable option. Under Alternative B, issuers will still have to implement supply chain controls such that a consumer will have a reasonable opportunity to purchase a Covered Card with a

¹² See 15 U.S.C. 1693m(c) and Section 205.20(e) of the Proposed Rule.

¹³ See 74 Fed. Reg. 60998.

five year term printed on it. This means that issuers will have to control the amount of inventory they print against the amount of time it takes for a Covered Card to be purchased. However, they will not have to put in place the precision controls required by Alternative A to prevent a card with an expiration date 4 years and 364 days out from being sold to a consumer. A consumer receiving a Covered Card under Alternative B still generally would be receiving a card or certificate with at least a five year term on it, but if a card or certificate with a lesser expiration date is sold the consumer will still have information on the Covered Card advising him or her that the underlying funds may be available beyond the term of the Covered Card.¹⁴ This information is sufficient for the consumer to understand the time period during which he or she has access to the funds loaded on the Covered Card.

The Board also requests feedback on the use of Alternative B during a transitional period prior to mandatory implementation of Alternative A. Wells Fargo appreciates that the Board may be offering this solution so that the industry has an opportunity to implement the controls required by Alternative A, if this option is adopted by the Board. However, Wells Fargo urges the Board to consider Alternative B on a more permanent basis as it provides a more balanced approach than Alternative A for minimizing consumer confusion while accounting for the logistical and economic challenges for the industry.

Wells Fargo also offers an Alternative C for the Board's consideration because it believes that certain situations are not adequately addressed by either Alternative A or B. Under Alternative C, a Covered Card could be issued with an expiration date shorter than a five year term so long as there is disclosure on the Covered Card that the underlying funds are available for a period of five years from issuance or the last load, whichever is later.

By allowing greater flexibility on card and certificate expiration dates, Alternative C offers a solution for replacement cards which are issued at some point between the initial issuance (or reload) and expiration of the underlying funds. Otherwise, given the requirement that cards not be issued with less than a five year expiration date, Wells Fargo is concerned that an inadvertent impact of the Proposed Rule is to extend the term of the underlying funds for additional time periods. For example, if a consumer purchases a card on January 1, 2010 and loses it in December of 2010, receiving a newly issued replacement card (upon request) on January 1, 2011, under the Proposed Rule the Covered Card would have to be reissued with another five year term even though the consumer should have only four years remaining to use the underlying funds. However, if the replacement Covered Card is issued with a five year term but the consumer only has four years to use the funds, Wells Fargo is concerned the consumer will be confused. Similarly, on a reloadable Covered Card, funds need to be available for a period of five years from the date of the last load, but this date in most cases will not match with the date on the Covered Card. If the Board through its regulation creates an expectation that the expiration date on the plastic will approximate the five year term of the underlying funds,

¹⁴ See Proposed Rule Section 205.20(e)(3)(i) - (iii), 74 Fed. Reg. 60999.

consumers may be disserved if they do not consider that the underlying funds may be available for a period longer than the term on the Covered Card. Accordingly, Wells Fargo hopes the Board will give Alternative C careful consideration or at a minimum provide additional guidance on how the reload and replacement card sequence should be handled.

F. Wells Fargo does not support automatic re-issuance of expired cards.

The Board has requested comment on whether issuers should be required to automatically issue a replacement card prior to the expiration date on a reloadable card. Wells Fargo is not supportive of such a requirement. Issuers should have the option of contractually agreeing with consumers to either re-issue a card at no cost upon the consumer's request or of remitting any balance on the card to the consumer through alternative means. For example, if the card maintains a *de minimis* balance at the end of the term stated on the card, an issuer may find it more cost effective (and the consumer may prefer) to receive the balance via (i) a check that he or she can then cash or otherwise deposit into an account or (ii) a direct credit to the consumer's deposit account, in the event the consumer also maintains a deposit account with the issuer.

Wells Fargo recommends that the Board allow both issuers and consumers flexibility in how they obtain the funds remaining on their Covered Card after the card expires but prior to the funds expiration date so long as the consumer does not have to pay the cost of receiving such funds.

G. Wells Fargo recommends that existing card stock, whether in circulation or in inventory, be grandfathered and excluded from coverage under the rule.

Under Section 915(d)(3) of the Electronic Funds Transfer Act, the final rule amending Regulation E to address Covered Cards (in the new Section 205.20) will be effective August 22, 2010. Wells Fargo urges the Board to apply this amendment prospectively and not to Covered Cards already in a consumer's hands.

To start, Wells Fargo is concerned that changing the terms on Covered Cards already in a consumer's possession may result in confusion with limited, if any, benefit to the consumer. This observation is particularly true in the case of non-reloadable gift cards because issuers generally do not have contact information for the consumers holding these cards and would not be able to inform them of a change in terms. Thus, consumer questions, complaints and confusion may increase as consumers hear about the new legislation but do not know which terms apply to the card or certificate in their possession.

Wells Fargo also recommends that the Board provide a reasonable transition period during which card stock already manufactured and in inventory may be used. Wells Fargo recommends that such transition period be no less than eighteen months to twenty-four months. Such an approach will help reduce the effort, cost, and

wastage associated with taking card stock that is already in inventory or out in the market on August 22, 2010, and having to destroy and replace it. For issuers of Wells Fargo's size with thousands of branches carrying these Covered Cards as a convenience for their customers, pulling and replacing inventory from various locations will be logistically challenging and costly. Further, given the prohibition on updating such card stock using vehicles such as stickers, Covered Cards in inventory generally could not be able to be updated to satisfy the new regulatory requirements, so the industry would literally be wasting millions of pieces of plastic.

Finally, to retroactively apply the requirements of the final rule would be inequitable to the issuer and outside the expectation of the consumer. When the consumer purchased the Covered Card, he or she did so with knowledge and acceptance of the applicable terms and conditions. Likewise, the issuer sold the product with a specific business model in place, having priced the products in accordance therewith. To change the terms and conditions applicable to products already under contract and already in the consumer's possession at such a late stage would be inappropriate and an unjustified amendment of the contract mutually agreed to by the purchaser and the issuer at the time the Covered Card was sold.¹⁵

II. General Comments

A. Wells Fargo requests the Board to consider preemption of state unclaimed property laws.

Section 205.12 of Regulation E provides that the Board shall determine on its own motion or upon the request of a state financial institution or other interested party, whether the act and this part preempt state law relating to electronic fund transfers. The Board's proposed amendment to this section would extend it to include a case by case determination of whether state laws related to dormancy, inactivity, or service fees, or expiration dates, are preempted.

The absence of express preemption in the case of state unclaimed property statutes is very concerning. As stated previously in this letter, Section 205.20(e) prohibits the sale of a Covered Card with an expiration date which is less than five years from issuance, whereby the five year expiration date applies to the underlying funds. The Board states in its commentary that the purpose of this requirement is to ensure that consumers receive the full protection established by the statute with respect to the value of their certificate or card.

¹⁵ In this connection, Wells Fargo would also urge the Board to consider whether the Takings Clause of the United States Constitution, U.S. Const. Amend. V., could be implicated if the Proposed Rule is applied retroactively to cards already issued to consumers. It is clearly established that contract rights are property subject to protection under the Takings Clause. *See Lynch v. United States*, 292 U.S. 571, 579 (1934). In this case, retroactive application of the rule may impact contract rights by precluding an issuer from assessing fees for which it had contracted.

The challenge, however, is that the time period for escheat of funds underlying Covered Cards under a state's unclaimed property law could be as short as three years.¹⁶ Accordingly, if a consumer, for example, in the state of California received a Covered Card and did not use that card for a period of three years thereafter, an issuer would normally follow its unclaimed property process to escheat any unclaimed property to the state after the running of the applicable three-year escheat period, assuming that California Unclaimed Property Law¹⁷ governed. In this case, if the funds were escheated but the consumer decided to use his or her card thereafter, the issuer would be obligated to authorize such transaction and then take steps to collect from the state of California any escheated funds.¹⁸

This process is not efficient and places an undue risk on the issuer that it may be funding a cardholder without being in possession of, or being able to recover, the amounts that were paid to fund the card. The issuer, for example, may not be able to prove to the satisfaction of the state that the funding of the cardholder relates to funds previously escheated, particularly if the Covered Card is not associated with the name of the cardholder. If, however, the Board were to determine that such inconsistent state unclaimed property statutes were preempted by the requirements in the proposed Section 205.20 of Regulation E, issuers would be in a better position to manage the risk associated with offering Covered Cards. The issuer could continue to honor transactions under the Covered Cards for up to the five-year funds availability period consistent with the Credit Card Act and thereafter escheat any remaining funds without having to suffer through the process of honoring transactions and seeking reimbursement from the state to which funds had been previously escheated, in the event the governing unclaimed property law requires escheat of funds underlying Covered Cards prior to the running of such five-year period.

Alternatively, if the Board is not prepared to preempt the unclaimed property laws of the states as suggested above, we urge the Board to consider through the final rule or commentary providing that for purposes of the final rule the cardholder continues to have funds underlying a Covered Card available for up to the five-year period, notwithstanding the escheat of funds underlying such cards, provided the cardholder has the funds available through an appropriate claim filed with the state to which the issuer has escheated the funds. The cardholder will thus be afforded an opportunity to purchase a Covered Card with at least five years to access the underlying funds. Subsequent to the escheat of such funds, the funds are available from the state and not from the issuer. Further, the issuer can without substantial risk comply with unclaimed property laws by escheating funds underlying Covered Cards thereunder.

B. Wells Fargo commends the Board's decision not to extend other Regulation E requirements (such as periodic statements and procedures for error resolution) to the Covered Cards.

¹⁶ See, e.g., CCP Sections 1520 and 1520.5.

¹⁷ CCP Section 1500, *et seq.*

¹⁸ CCP Section 1560(d).

The Board has proposed not to extend the other requirements that apply to accounts covered under Regulation E to Covered Cards at this time. Specifically, the Board notes that application of the periodic statement requirements under Section 205.9 or the error resolution requirements under Section 205.11 to Covered Cards would not be appropriate without taking into consideration the various other prepaid cards that may be marketed as substitutes for accounts that otherwise would be subject to Regulation E.

Wells Fargo agrees that broader application of Regulation E to the Covered Cards would create a set of obligations for these products that is neither merited nor manageable. Specifically, Wells Fargo notes that many of the Covered Cards will be non-reloadable in nature and that consumer information will not be on file with the issuer. Accordingly, an issuer would not necessarily be able to comply with the requirement to provide a periodic statement to a consumer. Gift cards by their nature are disposable and the cardholder expects to use the card and then dispose of it; it does not create the type of relationship between the issuer and the consumer that would justify application of the various other requirements in Regulation E.

Wells Fargo also commends the Board's observation that application of Regulation E to Covered Cards and not other prepaid card products could result in regulatory gaps and inconsistencies in these products that are still in their nascent stages of development. To create a system that is so difficult to navigate may result in various players leaving the industry due to concerns with regulatory compliance or costs associated with managing multiple systems and processes. The Board's decision will allow this industry to continue to innovate without unnecessary challenges or burdens.

On a related note, however, Wells Fargo requests the Board to consider adding some clarifications to Section 205.4 (General disclosure requirements; jointly offered services) of the Proposed Rule to make clear the disclosure requirements of the new proposed Section 205.20 will not be subject to compliance with the Electronic Signatures in Global and National Commerce Act ("E-Sign Act") (15 USC 7001 et seq.), which generally applies to Regulation E disclosures. Specifically, Wells Fargo recommends the addition of "except as otherwise provided in this part" to the end of the second sentence of the amended Section 205.4(a)(1). This will ensure that the language in this sentence is reconciled with the exemption from the E-Sign Act provided by the Board in its commentary to the Proposed Rule.¹⁹ The absence of this language could lead to ambiguity with respect to the applicability of the E-Sign Act to the disclosures required under new Section 205.20.

C. Wells Fargo commends the Board's Proposal not to regulate the amount of dormancy, inactivity, or service fees as well as the amounts below which such fees may be assessed.

¹⁹ See proposed Supplement I to Part 205-Official Staff Interpretations, Paragraph 20(c)-Form of Disclosures, Paragraph 20(c)(2) – Format, Commentary 1, 74 Fed. Reg. 60996.

Wells Fargo commends the Board's proposal to not regulate the amount of dormancy, inactivity, or service fees or the balances below which such fees or charges may be assessed because the Proposed Rule adequately addresses concerns related to excessive fees by limiting the types of fees and the timing for charging such fees. Further, given the recent announcements by certain issuers that they will no longer be charging any dormancy or service fees, it is clear that the industry practices are evolving and that this issue will likely resolve itself using basic market principles.

D. Wells Fargo urges the Board to provide additional clarity on what it means to be "marketed to the general public."

The Proposed Rule provides an exclusion for Covered Cards that are not marketed to the general public.²⁰ This exclusion means that a card or certificate that may have been subject to coverage under the Proposed Rule is not subject to its substantive provisions or its disclosure requirements if it is not offered, advertised, or otherwise promoted to the general public. The Board states that determination of whether a card or certificate would be subject to the exclusion will depend on specific facts and circumstances. For example, if a card may be purchased through retail channels, then it would not enjoy the exclusion if that product is obtained through non-retail channel (such as from an employer). The Board reasons that consumers will be confused when they receive gift cards through a non-retail channel that appear substantially similar to those they could have purchased directly, but contain different terms and conditions.

Wells Fargo supports the goal of minimizing consumer confusion and agrees with the concerns expressed by the Board. However, Wells Fargo requests that the Board include another example in its official staff interpretation for situations where an issuer offers similar products to its consumer customers and its commercial customers, but such products are sold under different names with different terms, plastics, and materials. For example, if an issuer markets a gift card to the general public that has features similar to a product it offers its commercial customers as a loyalty product, that commercial product should enjoy the exclusion provided in Section 205.20(b)(4) where that product has a different look and feel than the consumer product marketed to the general public. In that situation, it is highly unlikely a consumer receiving the commercial product would confuse it with the retail gift card.

Wells Fargo also requests that the Board reconsider the example regarding "tax refund cards" in its comments to Section 205.20(b)(4). The comments suggest that active marketing of the "ability of a consumer to receive a prepaid card for faster access to their tax refund proceeds" would negate the exclusion.²¹ Wells Fargo agrees that if a tax preparation company allows anyone off the street to come in and

²⁰ See proposed Supplement 1 to Part 205 – Official Staff Interpretations, Paragraph 20(b) – Exclusions, Paragraph (b)(4), 74 Fed. Reg. 60994.

²¹ 74 Fed. Reg. 60995

purchase a prepaid card which could be used for tax refunds, then the exclusion would not apply. But if, under the example provided, the only way a consumer could receive the tax refund prepaid card is by becoming a customer of that tax preparer and getting his or her taxes completed by the tax preparation company, then clearly the card is *not* being offered to the general public. Accordingly, Wells Fargo requests that the Board clarify that a tax preparation company's (or other similar company's) advertising of consumers' ability to obtain their tax refunds (or other funds) on a prepaid card does not, in itself, vitiate the exclusion, provided that the cards are not made available to the general public.

E. Wells Fargo is concerned that the exclusion for "reloadable" cards is overly narrow.

The Proposed Rule provides an exclusion for gift certificates, store gift cards, and general use prepaid card cards that are "[r]eloadable and not marketed or labeled as a gift card or gift certificate."²² However, the definition of "reloadable" in the proposed interpretations is limited to those cards with the "capability of having more funds added by a cardholder after initial purchase or issuance."²³ There are many non-gift prepaid cards that are reloadable but not necessarily by the cardholder. For example, many payroll cards are reloadable solely by the employer; health savings account cards and flexible spending account cards are reloadable, also by the employer; university cards, teen cards, insurance cards, disaster relief cards, and corporate expense cards may all be reloadable as well, but not by the cardholder. Such cards should not be included within the definition of "general use prepaid cards" and should not be subject to restrictions designed solely for gift card products. In addition, a possible result of this language may be to make more cards reloadable by the cardholder that otherwise are not intended to be reloadable. Accordingly, Wells Fargo suggests that the Board remove "by a cardholder" in the definition of "reloadable" as it makes the exclusion overly narrow and leads to the unintended consequence of subjecting many useful non-gift prepaid products to legislation which is intended only to cover gift cards.

III. Conclusion

Wells Fargo appreciates the opportunity to submit this letter for the Board's consideration in drafting its final rule. As a major financial institution, Wells Fargo is committed to serving the financial services needs of its customers in a cost effective and consumer friendly manner. To the extent additional consumer protection in the prepaid card space will further these goals, Wells Fargo supports the objectives of Section 401 the Credit Card Act and the Proposed Rule. Wells Fargo also is committed to helping create greater transparency relative to the fees and expiration dates applicable to Covered Cards. However, as the Board is aware, the prepaid card industry is still relatively young and in a state of tremendous growth. Therefore, we

²² Section 205.20(b)(2), 74 Fed. Reg. 61006.

²³ See proposed Supplement 1 to Part 205 – Official Staff Interpretations, Paragraph 20(b)(2), 74 Fed. Reg. 61008

respectfully urge the Board to consider all of the comments and suggestions herein, and promulgate a final rule that is flexible while furthering consumer protection goals.

If you have any questions or would like to discuss any of the issues raised herein, please do not hesitate to contact me at (415) 396-8186 or sharda.caro@wellsfargo.com.

Sincerely,

Sharda Caro-del-Castillo
Senior Counsel